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IN THE

Supreme Court of the United States

October Term, 1963

No. 592

COCHEYSE J. GRIFFIN, ETC., et al.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 12, 1963.

Opinions Below

The opinion of the court below is not yet reported and is appended hereto, *infra* as Appendix A. The August 23, 1961, and July 25, 1962, opinions of the district court are reported *sub nom. Allen* v. *County School Board of Prince Edward County*, at 198 F. Supp. 497 and 207 F. Supp. 349, respectively.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1). The decree of the court of appeals was entered on August 12, 1963, vacating the judgments of the district court on the authority of the doctrine of federal abstention. Application was made to this Court for a stay pending the filing and disposition of this petition for writ of certiorari. That application was granted on September 30, 1963, in an order signed by Mr. Justice Brennan.

Questions Presented

I

Whether the circumstances of this case are such that application of the doctrine of federal abstention is appropriate or required?

II

Whether a clear violation of the Fourteenth Amendment has been demonstrated, necessitating effective redress by the federal courts, in view of the uncontroverted evidentiary showing that the public schools of Prince Edward County were closed to avoid the obligation to maintain and operate an unsegregated public educational system, pursuant to an anticipated order of the federal court requiring desegregation, and to defeat and frustrate the federally protected rights of Negro children to educational opportunities free from the onus of racial discrimination?

III

Whether an injunction against the payment of state tuition grants should be broad enough to bar utilization of all such aid, grants or procedures which are, or may be, used to circumvent and nullify the realistic and effective desegregation of the public school system, and to frustrate and de-

feat the rights of Negro children to obtain equal educational opportunities, consistent with the due process and equal protection clauses of the Fourteenth Amendment?

IV

Whether the Fourteenth Amendment's guarantee of equal protection of the laws has been breached by publicly supported education being sponsored throughout the State of Virginia, except in Prince Edward County where it has been abandoned to prevent desegregation, as required by decisions of the federal courts?

Statement

Prior Court proceedings:

This litigation began in 1951. It reached this Court sub nom. *Davis* v. *County School Board of Prince Edward County* as one of the original school segregation cases. The law of the case, therefore, is to be found in *Brown* v. *Board of Education*, 347 U. S. 483, and in 349 U. S. 294, which established a formula for its implementation "with all deliberate speed" by federal district courts. Two years after the implementation decision, the district court held that additional time was necessary before desegregation, as decreed by this Court, should be put into effect. 149 F. Supp. 431 (E. D. Va. 1957). The court of appeals reversed that decision and ordered prompt and reasonable compliance with this Court's decree. 249 F. 2d 462 (4th Cir. 1957).[1] On August 4, 1958, in its decision on remand, the district court construed the "with all deliberate speed" yardstick as authorizing delay of desegregation of the

[1] This decision is reported sub nom. Allen v. County School Board of Prince Edward County. At this point Dorothy Davis and a number of the original plaintiffs had graduated and hence had lost all opportunity for enjoyment of the constitutional rights which had been declared theirs.

public schools in Prince Edward County until 1965. 164 F. Supp. 786. On May 5, 1959, the court of appeals again reversed the district court and, in this instance, ordered that desegregation of the public schools should commence in September, 1959. 266 F. 2d 507. It was not until April, 1960, that the district court entered an order on the May 5, 1959, mandate of the court of appeals.

The Closing of the Public Schools:

In the meantime, preparation had begun in Prince Edward County to close down the public schools in the event of court compulsion to operate a nonsegregated school system. On June 9, 1955, the Prince Edward School Foundation was chartered to furnish educational facilities for white children if and when the public schools were closed (T. 159).[2] On May 3, 1956, the Board of Supervisors adopted a resolution declaring it to be its policy and intention "in accordance with the will of the people of the said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored pupils are taught together under any plan or arrangement whatsoever."[3]

On June 3, 1959, the Board of Supervisors met and took action refusing to approve a budget for the operation of the public schools in the county for the 1959-1960 school year. In so doing, it stated for the record "that the Board of Supervisors of Prince Edward County does not intend to make any levy of taxes or to appropriate any money for the operation of public schools or for additional purposes in the year 1959-1960."

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[2] "T" refers to the transcript of the 1961 trial in the district court.

[3] The full text of this Resolution is appended hereto as Appendix B. It was introduced into evidence at the July 24-27, 1961, hearing in the trial court (R. 41).

In its statement the Board explained that it simply was not possible to operate a nonsegregated school system. It said, in part:

> * * * It is with the most profound regret that we have been compelled to take this action * * *
>
> * * *
>
> The School Board * * * is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people * * * we know that it is not possible to operate the schools * * * within the terms of that principle and * * * maintain an atmosphere conducive to the educational benefit of our people.
>
> We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.

This statement was made a part of the record of the Board's proceedings (T. 38, 39, 49, 50).[4] Since that date, no public schools have been in operation in Prince Edward County.

Educational Provisions for White Children in Lieu of Public Schools:

In September, 1959, the Prince Edward School Foundation began operation as a private nonsectarian institute for the education of white children in the county, with two secondary schools (which were consolidated as one senior high school in the second year of operation (T. 175)), and six elementary schools. Approximately 1,376 children were enrolled, all of whom were white (R. 175, 402).[5] The

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[4] The full text of the aforesaid statement is printed *infra* as Appendix C.

[5] Approximately 1,500 white children were eligible to attend public schools (T. 256) when the public schools closed in 1959 (198 F. Supp. at 499). 46 of those enrolled in the Foundation schools were children from outside the county (T. 175).

secondary school was accredited by the State Board of Education in 1961 (T. 183, 450).[6] During its first year of operation, no tuition was charged (T. 77, 178). Thereafter, however, a tuition fee was established—$240 per year for the elementary grades, $265 per year for secondary schooling (T. 70, 179).[7]

Educational Provisions for Negro Children in Lieu of Public Schools:

As a result of the closing of the public schools, approximately 1,800 Negro children were without schooling (T. 256, 305). The Negro citizens organized the Prince Edward County Christian Association (T. 347), and it operated training centers for Negro children commencing in February, 1960 (R. 340). There was no attempt to provide children in these centers with education in the strictest sense. During the first year, there were ten centers, and in the second year, fifteen (T. 340-341). Supervisors in charge of each center, in all but four instances housewives rather than school teachers, were given complete freedom to conduct the centers in any way they thought proper (T. 340-341). The centers were open from 10 A.M. to

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[6] Elementary schools do not receive state accreditation (T. 104, 454). The schools operated 180 days a year (T. 191-192), and were open from 8:30 A.M. until 1:30 P.M. (T. 193).

[7] The Foundation opened with a staff of 66 teachers. The first year all but two were teachers who had taught during the 1958-1959 school year in the Prince Edward County public schools, and at the time of the trial, in the summer of 1961, only seven or eight of the total number of teachers had not formerly taught in the county public schools (T. 176, 178). The Supplemental Retirement Act (§ 51-111.9 et seq., Code of Virginia, 1950, as amended), formerly limited to public school teachers, was amended in § 51-111.38:01 to embrace teachers in private, nonsectarian schools incorporated after December 29, 1956 (T. 504). Permission was obtained from the State Retirement System for teachers employed by the Foundation to participate in the state teacher retirement plan, pursuant to the provisions of § 51-111.31 (T. 183, 502-504).

1:30 P.M. (T. 341, 409, 419, 435). Their main purpose was to build morale and to foster the habit of group activity among the Negro children, "hoping someday that the public schools would reopen" (T. 341). There was no set curriculum nor uniformity. The children were taught a little arithmetic, reading and writing in some centers (T. 410, 419, 435), while in others no attempt was made to teach any of these basic skills (T. 430). There were no textbooks (T. 429, 441) and no class divisions or age groupings (T. 342). Of the 650 children originally enrolled, 441 remained throughout the year (T. 343). These 441 students, together with the 200 Negro children estimated to have obtained education outside of the county, left over 1,000 Negro children eligible for, but not receiving any kind of schooling (T. 343).

State and Local Tuition Grant Program:

The present tuition grant program had its genesis in the "massive resistance" legislation of the Extra Session of the General Assembly in 1956, chapters 56, 57, 58 and 62. This legislation provided for the channeling of public school funds into private schools, and for tuition grants for children in private schools where such children had been assigned to integrated public schools. In January, 1959, this legislation was significantly amended and, in April of that year, repealed, and a substitute enacted, which was substantially similar to the present 1960 tuition grant statute.[8]

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[8] The statement of the court below that "Virginia's program of tuition grants to pupils * * * has a lengthy history" is extremely misleading. Prior to 1955 this program was limited to children whose parents had been killed or disabled in World Wars I and II and thereafter. Almond v. Day, 197 Va. 419, 89 S. E. 2d 851 (1955), held tuition grants to children attending private nonsectarian schools contrary to Section 141 of the State Constitution which was promptly amended to permit grants to students attending private schools. The channeling of public school funds to private schools, while withholding them from integrated public schools, was held a violation of Section 129 of the Constitution of Virginia in Harrison v. Day, 200 Va. 429, 106 S. E. 2d 636 (1959).

Section 22-115.29, Code of Virginia, 1950, as amended, states that the General Assembly "mindful of the need for a literate and informed citizenry" declares it to be the policy of the state to encourage the education of all children. In furtherance of this objective, it is held to be in the public interest to provide scholarships from public funds for the education of children "in nonsectarian, private schools in or outside and in public schools located outside, the locality where the child resides." Authorization is given for levying of local taxes to provide such scholarships.

Section 22-115.30 provides that state grants shall be $125 per child in elementary school and $150 per child in secondary school. Sections 22-115.31, 22-115.32 and 22-115.36 provide for appropriations for local scholarships and require that local allowances, along with state grants, shall be sufficient to cover the cost of tuition, or a minimum of $250 in elementary school and $275 in secondary school.

During the 1960-1961 school term, state tuition grants of $150 were awarded parents for each child in the secondary school and $125 for each child attending the elementary schools of the Prince Edward School Foundation (T. 135).

On July 18, 1960, pursuant to above cited statutes, two ordinances were enacted by the Board of Supervisors. One provided for tuition grants of not less than $100 for each child for the parents of children enrolled in a private nonsectarian school in the county offering a course of systematic educational training of not less than 180 days duration. The second authorized a 25% real and personal property tax credit for contributions made to any nonprofit, nonsectarian private school operating in the county (T. 48).

Thus, parents of each child attending the Prince Edward School Foundation elementary schools in the 1960-61 school

term was eligible to receive $225 in public funds, and every child who attended the secondary school was eligible to receive $250 from the public treasury (T. 135, 237).[9] Some $332,441.11 (T. 200) was paid to the Foundation for tuition. In addition, tax credits in the amount of $52,866.22 was allowed on 1961 local taxes for contributions made to the Prince Edward School Foundation (T. 147, 152).[10] All of the foregoing facts are uncontroverted.

The Instant Court Proceedings:

A supplemental complaint was filed in June, 1960, and amended in September, 1960. The latter complaint joins the Board of Supervisors of Prince Edward County, the State Board of Education, the State Superintendent of Public Instruction and the County Treasurer as party-defendants, and prays that respondents be enjoined from: (1) refusing to maintain and operate a system of public free schools in the county; (2) expending public funds for the direct or indirect support of any private school which excludes persons by reason of race; (3) crediting any taxpayer with monies paid or contributed to any such private school; (4) conveying, leasing or transferring title to public schools in the county to any private corporation, association, partnership or individual; and (5) such other relief as the court might deem appropriate (A21-28).[11]

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[9] During the 1960-1961 school year 1,327 white students enrolled in the schools of the Foundation obtained state tuition grants (198 F. Supp. at 502). There was a total of $174,104.86 in state funds paid in tuition grants to children in Prince Edward County. Except in five instances, these $125 and $150 grants helped finance the education of children in the Foundation's schools (T. 135, 136). 1358 of these students obtained county tuition grants (T. 237), for a total of $135,800.

[10] The Negroes enrolled in the training centers made no effort to take advantage of the tuition grant plan (T. 344, 353). The State Superintendent of Education testified that these centers, in any event, did not meet state standards enabling those in attendance to participate in the state tuition grant program (T. 454, 458).

[11] A refers to the appendix to the brief of appellants (petitioners here) in the court of appeals.

On August 23, 1961, the district court filed the first of its two memorandum opinions (198 F. Supp. 497). It enjoined the use of public funds for the direct or indirect support of private schools for white children and the payment of tuition grants for children living *in Prince* Edward County to attend such schools as long as public schools in the county remained closed. The court expressly found the respondent Board of Supervisors' refusal to levy taxes or to appropriate money for the maintenance of public schools for the September, 1959-60, school term to have been in anticipation of the decision of the court of appeals ordering school desegregation to commence in September, 1959, and in accord with the Board's declared policy of May 3, 1956 to "abandon public schools and educate children in some other way, if that be necessary to preserve separation of the races * * *" (198 F. Supp. at 499). But the issue, as to whether the public schools could be closed to avoid implementation of the order of the federal courts requiring desegregation was left undecided. It was the court's view that this question would require interpretation of the Constitution and laws of the Commonwealth of Virginia and that, therefore, the doctrine of federal abstention was applicable. A formal order pursuant to this opinion was entered on November 17, 1961 (A-66).

Acting in accord with this view, proceedings were instituted in the Supreme Court of Appeals of Virginia for a writ of mandamus requiring the Board of Supervisors to levy taxes and appropriate money for the operation of free public schools in the county, on the grounds that such was required by Section 136, as read in the light of Section 129, of the Constitution of Virginia. On May 5, 1962, the Supreme Court of Appeals ruled that while the General Assembly was required by the Constitution of Virginia to maintain and operate an efficient system of free public schools, the Board of Supervisors could not be mandated to vote public funds for the maintenance of public schools

in the county. *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962).[12]

Petitioners returned to the federal court on March 26, 1962, with a motion for further relief, requesting final disposition of all the issues involved in the cause. After hearing and argument on the motion, the court, on July 25, 1962, filed its second memorandum opinion (207 F. Supp. 349), which dismissed petitioners' motion for further relief, denied respondents' motion to dissolve the injunction, continued in effect its injunction against the allowance of tax credits and tuition grants for so long as the public schools remained closed and held that the public schools in the county could not be closed to avoid the effect of the law of the land, while the state permitted other schools to remain open at the taxpayers' expense. The court found that the Board of Supervisors had caused the schools to be closed to avoid discontinuing the racial discrimination prohibited by this Court (207 F. Supp. at 351). The court further stated that if the public schools were not open by September 7, 1962, it would then consider "all proposed orders tendered by counsel of record" (*id.* at 355). It directed the county school board to submit on or before September 7, its proposed plans for the admission of pupils to the elementary and high schools of the county without regard to race (*Ibid*).

At the September 7, 1962, hearing, it was conclusively established that respondents had not complied with the July 25, 1962, decree; that the schools had not been reopened, and that in effect no plans for the re-opening of the schools had been made by the School Board, Board of Supervisors or any other responsible body. Thereafter, the court ordered, adjudged and decreed that the public schools could not remain closed to avoid the effect of the

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[12] In submitting the case to the state court, petitioners argued that there were no federal questions involved, and the court agreed, saying "we perceive none." 124 S. E. 2d at 229.

law of the land while other public schools in the State of Virginia remained open at the taxpayers' expense. The entry of an order of compliance, however, was deferred pending disposition of the cause by the court of appeals.

Petitioners appealed the refusal of the court to require compliance with its July 25, 1962, decree and the order of November 17, 1961, limiting the injunction against tuition grants and tax credits, for only as long as the public schools remained closed.

On November 6, 1962, petitioners filed their brief and appendix in the court of appeals, together with a motion to accelerate the appeal and for the convening of an extraordinary session of that court to hear and dispose of this cause in time for an order to be entered and enforced, requiring the re-opening of the public schools, no later than February 1, 1963.

The cause was argued below on January 9, 1963, but was not decided until August 12, 1963. This delayed adjudication ended all prospects of a final conclusion to this litigation in time for the public schools to be re-opened by September, 1963. The court, by a divided vote—one judge dissenting—ruled that federal abstention was the appropriate doctrine to be applied to all the issues in this cause and, thereupon, entered a decree vacating the judgments below. From this decree petitioners bring the cause here.

Reasons for the Allowance of Writ

1. Application of the doctrine of federal abstention in this cause is misplaced and in direct conflict with principles established in the decisions of this Court. *Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185; *Harrison* v. *NAACP*, 360 U. S. 167; *Chicago* v. *The Atkinson, Topeka & Santa Fe Ry. Co.*, 357 U. S. 77; *Gov't. and Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. 364; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Railroad Commission* v. *Pull-*

man Co., 312 U. S. 496; *Thomas* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

These cases all support the proposition that where the strands of local law are so intermeshed in the issues pending before the federal court, and an authoritative interpretation of the local law questions may make unnecessary consideration of the federal claims presented, the federal courts should abstain from deciding any of the questions involved until an adequate opportunity has been presented to the state courts to interpret the state law questions raised. They also are authority for the converse doctrine, viz., where neither interpretation nor determination of local law is prerequisite or necessary to judicial evaluation of the federal questions, the doctrine of federal abstention is improperly invoked.

The most recent explicit statement of this thesis is found in *McNeese* v. *Board of Education*, 373 U. S. 668. There, this Court stated at page 674 that where there are no underlying issues of state law controlling the litigation and the federal right is not "entangled in a skein of state law that must be untangled before the federal case can proceed" federal abstention is not appropriate. "For petitioners assert that respondents have been and are depriving them of the protection of the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law * * *. Such claims are entitled to be adjudicated in the federal courts".[13]

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[13] The Court also said at page 672 that Title 42, United States Code, Section 1983 was enacted to provide a federal remedy:

> 'where the state remedy though adequate in theory, was not available in practice,' * * * and to provide a remedy in the federal courts supplemental to any remedy any State might have.
>
> We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.

Jurisdiction in the instant case was invoked under Title 28, United States Code, Section 1343(3) and under Title 42, United States Code, Section 1983.

Petitioners respectfully submit that the *McNeese ratio decedendi* appropriately disposes of this cause.

In addition, the rationale of *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 463, is particularly apposite here. There this Court said:

> Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.

While a decision pursuant to Virginia law may profess to determine whether respondents are under a state obligation to maintain and operate public schools in Prince Edward County, this is an issue separate and distinct from the federal claims raised in this case, which are based upon the Constitution of the United States, *viz.*: (1) whether respondents may close the schools to avoid the implementation of an existing or anticipated federal court order to operate the public schools without discrimination on the basis of race; (2) whether respondents may close the schools to defeat and frustrate the right of Negro children to equal educational opportunities consistent with the due process and equal protection requirements of the Fourteenth Amendment; (3) whether the schools in Prince Edward County can remain closed while publicly financed education is available to other persons throughout the state without denying to the petitioners the equal protection of the laws as guaranteed by the Constitution of the United States; and (4) whether tuition grants and similar devices may be used as vehicles to defeat and frustrate the rights of the petitioners to free public education unburdened by

discrimination based upon race. These are all federal issues which must be determined in this cause and which cannot be settled with any finality in the state courts.

The basic irony of the present proceedings is that the district court's 1958 (165 F. Supp. 786) postponement of the commencement of desegregation until September, 1965, then seemed a flagrant mockery of this Court's mandate that desegregation proceed with "all deliberate speed." Now, however, that decision will more likely afford an earlier start towards compliance with the fundamental law than will be possible, if the opinion and decree of the court of appeals, brought here for review, prevails.[14]

(a.) The essential facts are not in dispute. Since June, 1959, the Board of Supervisors has refused to appropriate money or levy taxes for the operation of public schools to avoid the necessity of maintaining and operating them without discrimination based upon race, as they would be required to do pursuant to the mandate of the court of appeals of May 5, 1959 (266 F. 2d 507). Nor is there any dispute that the schools in Prince Edward County will remain closed until some court orders them to be opened. In *Brown* v. *Board of Education*, 347 U. S. 483, this Court held that segregation in the public schools was

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[14] The case the court of appeals ordered the trial court to withhold further proceedings pending its determination was begun on August 31, 1962, by the respondent Board of Supervisors and the School Board instituting a suit for a declaratory judgment in the Circuit Court of the City of Richmond. The suit sought resolution of various questions involved or alleged to be involved in the proceedings in the federal court. The Circuit Court of the City of Richmond entered its decision on March 21, 1963. It held that the closing of public schools in Prince Edward County did not violate the state or federal constitutions; that the system of tuition grants was not a scheme to evade Brown, and that state tuition grants were available notwithstanding the closing of the public schools. The cause is now pending before the Supreme Court of Appeals of Virginia, but its outcome cannot finally settle the federal questions posed in this litigation.

a denial of rights guaranteed under the Fourteenth Amendment. It has long been settled doctrine that constitutional proscriptions could not be violated by devices whether ingenious or ingenuous. *Lane* v. *Wilson*, 307 U. S. 268.

In *Cooper* v. *Aaron*, 358 U. S. 1, 17, the Court met an issue similar to the one presented here. It took pains to make clear that the Fourteenth Amendment reaches the activity of all state officials in whatever form the forbidden act may take, who by virtue of their public position under a state government deny to anyone the equal protection of the laws, in whatever guise it may be taken. See in accord: *Aaron v. Cooper*, 261 F. 2d 97 (8th Cir. 1958); *James* v. *Duckworth*, 170 F. Supp. 342 (E. D. Va. 1959), aff'd, 267 F. 2d 224 (4th Cir. 1959); *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed, 359 U. S. 1006; *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), aff'd, sub nom. *Faubus* v. *Aaron*, 361 U. S. 197; *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871 (E. D. La. 1961).

Every act of the state which seeks to subvert directly, or indirectly, the rights of persons to equal educational opportunities through access to nonsegregated public schools, is in violation of the Constitution's mandate. Power unquestionably exists in an appropriate federal tribunal to enjoin and restrain such conduct. Cf. *Cooper* v. *Aaron*, *supra*; *Bush* v. *New Orleans Parish School Board*, *supra*.

Whether there is a state obligation to maintain a statewide system of free public education, or whether each separate school district is free to maintain or refuse to finance a free school system in its locale, is not material or crucial to a determination of the fundamental issue presented in this case—whether schools may be closed to inhibit court orders and defeat constitutional rights. See *Aaron* v. *McKinley*, *supra*; *Cooper* v. *Aaron*, *supra*. Wherever that

ultimate obligation may rest, all the decided case law is to the effect that the responsible state agency cannot close or refuse to operate the public schools for the purpose of frustrating the orders of the federal courts or defeating vindication of the constitutional rights of Negro children. *Cooper* v. *Aaron*, *supra*; *Aaron* v. *McKinley*, *supra*; *Bush* v. *New Orleans Parish*, *supra*; *James* v. *Almond*, *supra*; *James* v. *Duckworth*, *supra*.

Swimming pools and parks are not schools. Hence, *Tonkins* v. *City of Greensboro*, 276 F. 2d 890 (4th Cir. 1960) and *City of Montgomery* v. *Gilmore*, 277 F. 2d 364 (5th Cir. 1960), are inapposite. Here, the state is fully involved in the educational process and in the maintenance, operation, and supervision of public schools now operating throughout the state. [15] Certainly, there is no decision hold-

[15] "The public free school system", declares § 22-2, Code of Virginia, 1950 "shall be administered by a State Board of Education, * * * a Superintendent of Public Instruction, division superintendents of schools, and county and city school boards." The State Board under § 22-31 (this and all ensuing citations are to the Code of Virginia, 1950) prescribes the qualifications for division superintendents who are appointed by the local boards from a list of eligible persons certified by the State Board, § 22-32, and who receive a salary not less than a minimum set by the state law, of which the State contributes sixty per cent. § 22-37.

Moreover, the State Board prescribes rules and regulations for the conduct of high schools, requirements for admission, and conditions upon which puplis may attend such schools. § 22-191. It examines (§ 22-202) and certifies teachers (§ 22-204), and local boards, subject to some exceptions, may employ only teachers so certified. § 22-204. It adopts rules and regulations governing the purchase (§ 22-295) and selection of textbooks. § 22-296. The State has appropriated 45 million dollars to aid counties and cities in construction of needed public school buildings and in the development of vocational education. § 22-146.1 *et seq.*

The power and duties of local school boards are prescribed in detail by § 22-45, *et seq.* The subjects to be taught in the elementary grades are specified in § 22-233 to § 22-238. Article IX, § 129 of the State Constitution directs that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State." See also Va. Code §§ 22-5; 22-21; 22-25; 22-30.

ing that a state agency may abandon the public schools for the purpose of avoiding compliance with the law of the land, and to the extent that *Tonkins* and *City of Montgomery* are authority to the contrary, they promote confusion and conflict. Thus, the issue ought to be conclusively resolved and determined by this Court.

It is clear that petitioners' right to equal protection of the laws is violated when they are denied equality of educational opportunity through access to nonsegregated education solely because of their race and residence in Prince Edward County. See *Bush* v. *Orleans Parish School Board, supra.*

As was stated in *James* v. *Almond* at page 337: "no one public school or grade" can be closed in one part of the state or in a particular community "to avoid the effect of the law of the land", while "other public schools or grades remain open", as long as the state directly or indirectly maintains and operates a public school system or participates in any way in its management. See in accord, *Aaron* v. *McKinley, supra; Hall* v. *St. Helena Parish,* 197 F. Supp. 649, 656 (E. D. La. 1961).

When *Harrison* v. *Day,* 200 Va. 429, 106 S. E. 2d 636 (1959), and *James* v. *Almond, supra,* were decided it was clear to the Supreme Court of Appeals of Virginia and to the special statutory three-judge District Court that Virginia maintained and operated a statewide system of public education. At that time, Prince Edward County was an integral part of the state system. It is of no moment whether a duty to provide a free public education evolves upon the state in lieu of the county's failure to do so. The controlling factor is that public education is being maintained and offered in other parts of Virginia, while it is being denied in Prince Edward County. Whether this discrimination relates to geographical placement (see *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Baker* v. *Carr,* 369 U. S. 186, or to race or color differentiation (*Brown*

v. *Board of Education, supra*), it raises a Fourteenth Amendment question, determination of which is the appropriate province of the federal courts.

(b). The trial court enjoined payment of state and county tuition grants to permit children to attend private, nonsectarian schools in the county and invalidated the allowance of tax credits for contributions to such schools, for only so long as public schools remain closed. Petitioners appealed to the court of of appeals the limited scope of the injunctive relief granted and raise its validity in this petition.

In *Cooper* v. *Aaron, supra*, this Court said at page 19: "state support of segregated schools through any arrangement, management, funds or property" violated the prohibitions of the Fourteenth Amendment. That the tution grant program, promulgated in Section 22-115.29 *et seq.*, of the Code of Virginia, 1950, as amended, was designed to meet the problems posed by the constitutional requirement that segregated public schools be eliminated, is a matter of public record. Considering the participation of state agencies and funds in the "private" school system provided for white children in Prince Edward County, the question raised by the court below, whether the state is operating a "state-wide, centralized system of schools" (Appendix A at page 14a) is not an adequate buttress for further delay in determining when declared federal rights will be accorded. Clearly, state policy cannot and should not be used as an instrumentality to evade or defeat the command of the Constitution.

It is well settled that acts generally lawful may become unlawful when done to accomplish unlawful ends. *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105; Cf. *Gomillion* v. *Lightfoot, supra.* It is equally clear, petitioners respectfully submit, that under the Fourteenth Amendment, tuition grants, tax credits or similar devices used, or capable of use, to impede or frustrate an effective and realistic transi-

tion from a segregated school system to one not based upon considerations of color should be enjoined, without regard to whether public schools are closed. This must be so, or else a situation could obtain in which public schools were operated for Negro children, while the white children, whose tutiion was payed for by public moneys in the form of tuition grants, attended private, non-profit, nonsectarian schools. This is not our case, but it does not take much imagination to anticipate this as the next step, provided respondents are ordered to maintain a public school system.

(c). Decisional authority since *Brown* v. *Board of Education, supra* is persuasive that protracted litigation assists in the devising of infinite means to delay and to avoid the constitutional requirement of unsegregated public education. Judicial procedural doctrine must not become accessorial to the persistant denial of previously adjudicated constitutional rights. Important issues, imperative of determination, are raised by this case and whatever may, in other circumstances, be the merit of the doctrine of federal abstention, too much stress cannot be placed on the fact that these proceedings for vindication of the rights of Negro children to equal educational opportunities are still pending in the federal courts after 12 years of litigation. The district court assumed jurisdiction of the cause in 1951, and such assumption gave the federal courts power to determine all the questions involved. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Wofford Oil Co.* v. *Smith*, 263 Fed. 396, 403 (M. D. Ala. 1920), appeal dismissed, 256 U. S. 705. These factors, which in themselves set this case apart, cannot be overlooked or discounted, in arriving at an appropriate solution to this controversy.

After 12 years of litigation, it is time all issues are settled and settled with finality. For the federal courts to refuse, at this late date, to resolve this controversy amounts to federal abdication, not federal abstention. See *McNeese* v. *Board of Education, supra.*

2. This cause is of great public importance and should be reviewed and determined by this Court. In 1951, as aforesaid, Negro children in Prince Edward County commenced a lawsuit designed to establish their right and the right of other Negro children to equality of education, unburdened by discrimination based upon the accident of race. Those rights have since been clearly and conclusively vindicated by this Court in *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra,* and most recently in *Goss* v. *Board of Education,* 373 U. S. 683. Indeed, in *Watson* v. *Memphis,* 373 U. S. 526, this Court made clear that the "deliberate speed" proviso enunciated in *Brown* was not intended as a euphemism for indefinite delay in eliminating racial barriers in schools.

Yet, twelve years after this cause was instituted, nine years after the law of the case was determined and eight years after an implementation formula was announced, no Negro child in the county has benefited in any way from those decisions. The original complainants and many of the subsequent intervenors are no longer of public school age. Cherished rights have been irretrievably lost. While this personal tragedy may be rationalized as an evil incidental to any attempted social transformation, the protracted nature of these proceedings, the successful defiance of the Constitution by respondents, and the apparent helplessness, failure or refusal of the federal judiciary to afford any measure of effective relief, necessarily, undermines confidence in the administration of justice in our courts. Since the very matrix of our system is adherence to the rule of law, this cause raises questions of national consequence which necessitate the intervention of this Court.

Moreover, not only have respondents successfully frustrated vindication of the rights of petitioners and their predecessors to access to nonsegregated public education, but during the past five years, they denied Negro children access to all public education. Thus, in addition to the burdens of race, with its unrelenting pressures which tend

to relegate these petitioners as a class to a position of subservience, there is added the tragic encumbrance of ignorance. The closing of the schools in Prince Edward County, in callous disregard of public responsibility, marks one of the most shameful chapters in the history of American race relations.

Education is one of the most important functions of government today. It is essential to the perdurance of democratic institutions, necessary for our survival as an open society or, indeed, as any society at all.

As this Court pointed out in *Brown* at page 493:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

The opportunties and benefits which accrue to a child upon receipt of an education have been denied to Negro children in Prince Edward County since June, 1959, because respondents concluded, rather than accord petitioners their constitutional right to a public school education on a nonsegregated basis, that they would deny educational opportunities altogether. No value ranks higher on respondents' scale than the right to practice and enforce racial segregation. Since that practice could no longer be enforced in public schools, public education was eliminated. At the same time, the Prince Edward School Foundation, tuition grants and tax credits were readied to make

certain that no loss in educational benefits should befall the white child.

Thanks to the Government of the United States, formal, standardized education has been provided Negro children in the county since September, 1963, under private auspices. While this arrangement, undoubtedly, will be advantageous to some Negro children in the county, it does not meet the constitutional issues raised in this petition.

No person who asserts, as petitioners do, a valid and conclusively defined constitutional claim should be without redress in the federal courts. In view of the protracted nature of this litigation, the fundamental importance of its resolution to petitioners and to the country at large, it is urgently and respectfully requested that this petition and all issues involved herein should be disposed of in such convenient haste, as will give respondents sufficient time to make whatever arrangements are necessary to reopen the public schools, if it is determined that they must, and begin operation of a nonsegregated public school system by September, 1964.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

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APPENDIX A

Opinion of United States Court of Appeals Filed August 12, 1963

HAYNSWORTH, Circuit Judge:

Transmuted, this old case, in its new flesh and pregnant with questions, comes again before us.

As Davis, et al., v. County School Board of Prince Edward, et al., it began in 1951 as a suit to effect the desegregation of the public schools maintained by Prince Edward County, Virginia. It was one of the four school cases decided by the Supreme Court of the United States in Brown v. Board of Education, 347 U. S. 483. As Allen, et al. v. County School Board of Prince Edward County, Virginia, et al., the case was again before this Court in 1957 [1] and, still again, in 1959. [2]

In our opinion filed in May 1959, when this case was last here, we directed the entry of an injunction requiring the then defendants to receive and consider, on a nondiscriminatory basis, applications by Negro pupils for enrollment in high school for the school term beginning in September 1959. We also directed the entry of an order requiring the School Board to make plans for the elimination of discrimination in the admission of pupils to the elementary schools at the earliest practicable date. On remand to the District Court, no order was entered until April 22, 1960, when the District Court entered a formal order requiring the immediate elimination of discrimination in the admission of Negro applicants to high schools and the formulation of plans for the elimination of discrimination in the admission of applicants to elementary schools. Meanwhile, however, all public schools in Prince Edward County has been closed.

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[1] 249 F. 2d 462.
[2] 266 F. 2d 507.

Appendix A

During the summer of 1959, the Board of Supervisors of Prince Edward County, though it had received from the School Board budgets and estimates of the cost of operating the schools for the 1959-1960 school year, did not levy taxes or appropriate funds for the operation of the schools during that year. Though certain funds have come into the hands of the School Board, out of which it has been able to meet certain maintenance and insurance expenses and debt curtailment, it has received no funds with which it could operate the schools, for, annually, the Board of Supervisors has failed, or declined, to levy taxes or appropriate funds for the operation of the schools.

In September 1960, the present plaintiffs obtained leave to file a supplemental complaint, which was supplanted by an amended suplemental complaint filed in April 1961. By these supplemental pleadings, the County Board of Supervisors, the State Board of Education and the State Superintendent of Education were brought in as additional defendants. By the amended supplemental complaint, the plaintiffs sought an order requiring the defendants to operate an efficient system of free public schools in Prince Edward County, forbidding tuition grants to pupils attending private schools practicing segregation, forbidding tax credits to taxpayers for contributions to private schools practicing segregation, and forbidding a conveyance or lease of any property of the School Board of Prince Edward County to any private organization.

The District Court entered an injunction against payment of tuition grants to pupils attending the schools operated by the Prince Edward School Foundation and against the allowance of tax credits by Prince Edward County on account of contributions to that Foundation. Initially, it abstained from deciding the questions of state law upon which the reopening of the free public schools depended, but, after the plaintiffs had aborted the effort to have the

relevant questions decided by the state courts,[3] the District Court undertook to decide them itself. It ordered the schools reopened, but postponed the effectiveness of that order pending this appeal. There was no evidence that anyone had any idea the school buildings and property owned by the School Board would be sold or leased, and no order was entered affecting their disposition.

For the District Court to get to the merits, it had to bypass a number of preliminary questions, including the very troublesome question arising under the Eleventh Amendment, all of which are brought up before us. On the merits of each of the three main issues, the parties

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[3] The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. It held mandamus unavailable because, it concluded, the Board of Supervisors' function was legislative and discretionary, not ministerial, Griffin, et al. v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227. It did not consider whether or not Virginia or any of its agencies has an affirmative duty to operate free public schools in Prince Edward or whether it can operate public schools elsewhere while those in Prince Edward remain closed. It did not consider many of the questions of state law which underlie those two ultimate questions.

Later the defendants, or some of them, brought an action for a declaratory judgment in the Circuit Court of the City of Richmond. The plaintiffs here were named defendants there, and one of their attorneys was appointed guardian ad litem for the infants. On March 21, 1963 Judge Knowles filed an opinion in which the major questions are resolved in the favor of the agencies and officials of the Commonwealth and county. An appeal has been taken to The Supreme Court of Appeals of Virginia and will be heard in October, a few months hence. See Southern School News, July 1963, Vol. 10, No. 1, page 12.

advanced innumerable alternate offenses and defenses, but it is obvious that the answer on the merits, in one instance exclusively and in other instances largely, rests upon interpretations of state law. It is also apparent that a proceeding in the state courts will avoid most of the technical procedural difficulties which must be disposed of before the merits can be determined in this action. Under these circumstances, we think the District Court properly decided, in the first instance, that it should abstain from deciding the merits of the principal issue until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues, where the answers are so closely related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law, as will presently appear, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.

In 1959, after the Board of Supervisors of Prince Edward County failed to levy taxes for the operation of the schools during the school year 1959-1960, a corporation known as Prince Edward School Foundation was organized for the purpose of operating private schools in the county. It was launched by private contributions of $334,712.22. With the receipt of tuition charges [4] and continuing private contributions, it has successfully operated primary and secondary schools in Prince Edward County which are attended solely by white pupils. It has used none of the facilities of the School Board. Until the District Judge

[4] There were no tuition charges during the first year, 1959-1960. That year all expenses were met out of contributions. Since then tuition has been charged.

enjoined their payment, pupils attending schools of the Prince Edward School Foundation, generally, received tuition grants paid jointly by Virginia and Prince Edward County, which approached but did not equal the tuition charges they had to pay.

Negro citizens of Prince Edward County at first made no effort to provide schools for their children. They declined proffered assistance in such an undertaking. Some of their children obtained admission to public schools in other counties of Virginia and, since 1960, obtained, or were eligible for, tuition grants when they did so. The great majority of Negro children, however, for a time, went with no schooling whatever. Later, certain "training schools" were established and a substantial number of Negro pupils, but far from all, have attended those training schools.

On the principal issue, the question whether the plaintiffs have a judicially enforceable right to have free public schools operated in Prince Edward County, the plaintiffs contend that the closure of the schools, taken either alone or in conjunction with the subsequent formation of the Prince Edward School Foundation and its operation of private schools for white pupils only, was the kind of "evasive scheme" for the perpetuation of segregation in publicly operated schools which was condemned in Cooper v. Aaron, 358 U. S. 1. The United States, as *amicus curiae* advances a different principle, contending that there is a denial of the Fourteenth Amendment's guarantee of equal protection of the laws when the Commonwealth of Virginia suffers the schools of Prince Edward County to remain closed, while schools elsewhere in the state are operated.

As to the plaintiffs' contention, it may be summarily dismissed insofar as it is viewed as a contention that the Fourteenth Amendment requires every state and every

school district in every state to operate free public schools in which pupils of all races shall receive instruction. The negative application of the Fourteenth Amendment is too well settled for argument.[5] It prohibits discrimination by a state, or one of its subdivisions, against a pupil because of his race, but there is nothing in the Fourteenth Amendment which requires a state, or any of its political subdivisions with freedom to decide for itself, to provide schooling for any of its citizens. Schools that are operated must be made available to all citizens without regard to race. but what public schools a state provides is not the subject of constitutional command.

The plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this Court. The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds, they have been powerless to operate schools, but, even if they had procured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination.

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[5] Byrd v. Sexton, 8 Cir., 277 F. 2d 418, 425; Kelley v. Board of Education of City of Nashville, 6 Cir., 270 F. 2d 209, 228-229; School Board of City of Newport News v. Atkins, 4 Cir., 246 F. 2d 325, 327; Avery v. Wichita Falls Independent School District, 5 Cir. 241 F. 2d 230, 233; Wheeler v. Durham City Board of Education. M. D. N. C., 196 F. Supp. 71, 80, reversed on other grounds, 309 F. 2d 630; Dove v. Parham, E. D. Ark., 181 F. Supp. 504, 513 affirmed in part, reversed in part, 271 F. 2d 132; McKissick v. Durham City Board of Education, M. D. N. C., 176 F. Supp. 3, 14: Thompson v. County School Board of Arlington, E. D. Va., 144 F. Supp. 239, affirmed 240 F. 2d 59; Briggs v. Elliott, E. D. S. C. (Three Judge Court) 132 F. Supp. 776, 777.

Appendix A

The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often repeated[6] statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

This we held in a different context in Tonkins v. City of Greensboro, 4 Cir., 276 F. 2d 890, affirming 162 F. Supp. 549. Faced with the necessity of desegregating the swimming pools it owned, the City of Greensboro, North Carolina, chose instead to sell them. Upon findings that the sale of the pool, which the City had theretofore reserved for use by white people only, was bona fide, it was held that there had been no denial of the constitutional rights of the Negro plaintiffs, though the pool was thereafter operated on a segregated basis by its private owners.[7]

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[6] See Griffin v. Illinois, 351 U. S. 12, 23, 76 S. Ct. 585, 593, 100 L. Ed. 891; Hall v. St. Helena Parish School Board, E. D. La. (Three Judge Court) 197 F. Supp. 649, 655.

[7] See also City of Greensboro v. Simkins, 4 Cir., 246 F. 2d 425.

Similarly, when a state park was closed during pendency of an action to compel the state to permit its use by Negroes on a nondiscriminatory basis, we held that closure of the park mooted the case requiring its dismissal.[8]

Other courts have clearly held that a municipality which had been ordered to desegregate facilities which it had operated, may abandon the facilities without violating the injunctive order or the rights of the Negro plaintiffs.[9] The only limitation of the principle is that a municipality may not escape its obligations to see that the public facilities it owns and operates are not open to everyone on a nondiscriminatory basis by an incomplete or limited withdrawal from the operation of them. If the municipality reserves rights to itself in disposing of facilities it formerly owned and operated, subsequent operation of those facilities may still be "state action."[10]

Nothing to the contrary is to be found in James v. Almond.[11] There, the Court had ordered the admission of seventeen Negro pupils into six of Norfolk's schools theretofore attended only by white pupils. Under Virginia's "Massive Resistance Laws," the Governor of Virginia thereupon seized the six schools, removed them from Norfolk's school system and closed them. All other schools in Norfolk and elsewhere in Virginia remained open. It was held, of course, that the statutes under which the Governor acted were unconstitutional, for Virginia's requirement that all desegregated schools be closed while segregated schools remained open was a denial of equal protection of the laws. There was no suggestion that Virginia might

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[8] Clark v. Flory, 4 Cir., 237 F. 2d 597.

[9] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 319; Gilmore v. City of Montgomery, 5 Cir., 277 F. 2d 364; and see Willie v. Harris County, E. D. Texas, 202 F. Supp. 549.

[10] Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320.

[11] E. D. Va. (Three Judge Court) 170 F. Supp. 331.

not withdraw completely from the operation of schools or that any autonomous subdivision operating an independent school system might not do so.

The decision in Hall v. St. Helena Parish School Board[12] is not a departure from the principle. There, it appeared that, confronted with court orders to desegregate schools in certain parishes in Louisiana, the Governor of that State called an extraordinary session of the Legislature, which enacted a number of statutes designated to frustrate enforcement of the court's orders. One of the statutes provided for the closure of all schools of a parish upon a majority vote of the parishioners. It was accompanied by other statutes providing for the transfer of closed schools to private persons or groups, providing for educational cooperatives and regulating their operations, providing tuition grants payable directly to the school and not solely to the pupils and their parents, providing for general supervision of the "private schools" by the official state and local school boards, and providing, at state expense, school lunches and transportation for pupils attending the "private schools." Construing all these statutes together, as it was required to do, the Court, with abundant reason, concluded that the statutes did not contemplate an abandonment of state operation of the schools but merely a formal conversion of them with the expectation that the schools would continue to be operated at the expense of the state and subject to its controls. Desegregation orders may not be avoided by such schemes, but there is nothing in the *Hall* case which suggests that Louisiana might not have withdrawn completely from the school business. It was only because it had not withdrawn that the statutes which composed its evasive scheme of avoidance were struck down.

The plaintiffs largely content themselves with assertions that closure of the schools was motivated by the filing of

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[12] E. D. La. (Three Judge Court) 197 F. Supp. 649.

our opinion in May 1959, from which it was apparent that the District Court would be required to enter a desegregation order. They emphasize a resolution adopted in 1956 by a predecessor Board of Supervisors expressing an intention to levy no tax and appropriate no funds for the operation of desegregated schools.[13] More broadly, they contend that closure of the schools, with the effect of avoiding the operation of integrated schools, is a violation of the Fourteenth Amendment or of the injunctive order.

Facially, what we have said will dispose of the plaintiffs' contention, but the matter does not necessarily end there. As we have seen, if Virginia or Prince Edward County can be said to be still operating schools through the Prince Edward School Foundation, then the principles of Cooper v. Aaron, 358 U. S. 1, would require a remedial order.[14] If Prince Edward County has not completely withdrawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.[15]

The plaintiffs do not contend that Prince Edward County or Virginia had a hand in the formation of the Prince Edward School Foundation. There is no suggestion that any agency, or official, of Virginia, or of Prince Edward County, has any authority to supervise the operation of the schools of the Prince Edward School Foundation, except insofar as Virginia exercises a general police supervision over all private schools and except that Virginia

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[13] One of the questions much debated is whether a court may inquire into the motive of a legislative body when it considers the constitutionality of the legislative body's act or inaction.

[14] See Hall v. St. Helena Parish School Board, E. D. La. (Three Judge Court) 197 F. Supp. 649; Hampton v. City of Jacksonville, 5 Cir., 304 F. 2d 320; City of Greensboro v. Simkins, 4 Cir., 246 F. 2d 245.

[15] James v. Almond, E. D. Va. (Three Judge Court) 170 F. Supp. 331.

accredited the schools of the Foundation when they met the requirements applicable to all private schools. Indeed, during the first year of operation, the schools of the Foundation appear to have been as independent of governmental authority as any sectarian or nonsectarian private school in Virginia.

Beginning with the school year 1960-1961, pupils attending schools of the Foundation did receive tuition grants. One of Virginia's statutes [16] providing for the tuition grants authorized participation by the counties. If a particular county does not participate in the tuition grant program, the state will pay the maximum allowable grant but will deduct a portion of its payment from other state funds distributed for purposes unrelated to schools to the nonparticipating county.[17] It was apparently for that reason that in 1960 the Board of Supervisors of Prince Edward County provided for tuition grants which would take the place of a portion of the state grant but would not supplement the funds otherwise available to the pupil. In its effect upon Prince Edward County, its participation in the state-wide program of tuition grants amounted to no more than taking dollars from one of its pockets and putting them into another. As for pupils who were residents of Prince Edward County attending schools of Prince Edward Foundation, or any private school, or a public school outside of the county, they got no more by reason of the county's participation in the program.

In 1960, the Board of Supervisors of Prince Edward County also adopted an ordinance providing for credits to taxpayers, not exceeding twenty-five per cent of the total tax otherwise due, for contributions to nonsectarian schools not operated for profit located in Prince Edward County, or to be established and operated in that county

[16] Code of Virginia § 22-115.31 (1960 Cum. Supp.).

[17] Code of Virginia § 22-115.34 (1960 Cum. Supp.).

during the ensuing year. During the school year 1960-1961, credits aggregating $56,866.22 were allowed by Prince Edward County on account of contributions made to the Foundation.

The allowance of such tax credits appear to be an indirect method of channeling public funds to the Foundation. They are very unlike Virginia's program of tuition grants to pupils which has a lengthy history.[18] The allowance of such tax credits makes uncertain the completeness of the County's withdrawal from the school business. It might lead to a contention that exclusion of Negroes by schools of the Foundation is county action. Their allowance, however, during the second [19] of the four years that the Foundation has operated its schools does not require a present finding on this record that the County is still in the school business, and that the acts of the Foundation are its acts.

Bearing in mind the fact that the Foundation established and operated its schools without utilization of public facilities and, during the first year, without any direct or indirect assistance of public funds, and the clear showing of the independence of the Foundation from the direction and control of the defendants, the allowance of the tax credits is at least equivocal. Inferences of power to influence, if

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[18] Virginia's tuition grant program had its first beginning many years ago in aid of children who had lost their fathers in World War I. It was expanded to include others until 1955 when the Supreme Court of Appeals of Virginia held that the tuition grants were in violation of Virginia's Constitution when given to pupils attending private schools. Almond v. Day, 197 Va. 419, 89 S. E. 2d 851. Section 141 of Virginia's Constitution was promptly amended to overturn the result of Almond v. Day. The statutes authorizing Virginia's present, broad program of tuition grants were enacted in 1960.

[19] In the first year of the Foundation's operation, the County had no provision for any tax credits for contributions. After the second year, no such credits were allowed because of the Court's order.

not to control, may follow such encouragement of contributions, though the allowance of income tax deductions by the State and United States for contributions to religious and charitable organizations is not thought to make state or nation a participant in the affairs and operations of the beneficiaries of the contributions. Indeed, their allowance has come in recognition of public interest in encouragement of private contributions to religious, educational and charitable institutions and organizations. Here, however, the allowance of the tax credit comes in a more particularized context, and that context is not complete without consideration of Virginia's tuition grants.

As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned. Elsewhere, apparently, it has not been utilized to circumvent the segregation of public schools. In the school year just closed, thirty-one school districts in Virginia were desegregated to some degree.[20] The basic program of tuition grants, however, its antecedents and its operation and effect were not examined by the court below.[21]

Moreover, the effect of tax credits and tuition grants ought to be determined only in the light of the correlative duties and responsibilities of the Commonwealth and the County in connection with the operation of schools in the County. What they are and how they are distributed turn entirely upon the proper construction of a number of constitutional and statutory provisions of the Commonwealth. If, as the District Court found, Virginia's Constitution requires the Commonwealth as such to open and operate schools in Prince Edward County, what Prince Edward

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[20] Southern School News, June 1963, Vol. 9, No. 12, page 1.

[21] It enjoined payment of tuition grants by the state because it construed the state statutes as not authorizing them, a construction which we find, at least, dubious.

County does in the allowance of tax credits for contributions to otherwise independent educational institutions may be of little moment. On the other hand, if Prince Edward County should be held to have a duty under state law to operate free public schools, then its allowance of tax credits might be a basis for a conclusion, in light of the tuition grant program, that it was undertaking to discharge its duty by indirection and, in effect, was operating the schools of the Foundation.

Such a determination can be made only when the underlying questions of state law have been settled.

The two branches of the principal issue are closely interrelated. As appears above, the question of whether or not Prince Edward County, or Virginia, has such a hand in the operation of the schools of the Foundation as to result in a Fourteenth Amendment requirement that they operate free, public schools on a nondiscriminatory basis for all pupils in the county is dependent, in large measure, upon a determination of Virginia's distribution of authority, duty and responsibility in connection with the schools and their control and operation. Applicability of the principle advanced by the United States as *amicus curiae* depends entirely upon the answers to those questions of state law, for no one questions the principle that if Virginia is operating a state-wide, centralized system of schools, she may not close her schools in Prince Edward County in the face of a desegregation order while she continues to operate schools in other counties and cities of the Commonwealth. Application of the constitutional principle turns solely upon a determination, under state law, of Virginia's role in the operation of public schools in Virginia.[22]

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[22] Here, the Eleventh Amendment question arises. The more the United States asserts that Virginia's Constitution places affirmative, but neglected duties upon Virginia's General Assembly and State Board of Education, the closer it skirts the Eleventh Amendment's prohibition against suits in the courts of the United States by citizens against a state.

Appendix A

The answers to these questions are unresolved and unclear. On the one hand, the United States points to Section 129 of Virginia's Constitution, which provides, "The General Assembly shall establish and maintain an efficient system of public, free schools throughout the state," and to those constitutional and statutory provisions providing for a State Board of Education and a Superintendent of Public Instruction, and defining their duties and responsibilities. On the other hand, the defendants point to Section 133 of Virginia's Constitution which provides that supervision of schools in each county and city shall be vested in a school board and to other constitutional and statutory provisions which, unquestionably, vest large discretionary power in local school boards and in the governing bodies of the counties and cities in which they function.

By Section 130 of the Constitution, the State Board of Education "has general supervision of the school system." It has the power to divide the state into school divisions, though no school division may be smaller than one county or one city. When a Division Superintendent of Schools is to be appointed, the State Board of Education certifies to the local board a list of qualified persons, and the local board may appoint anyone so certified. It selects and approves textbooks for use in the schools. It is required to manage and invest certain school funds of the state, and the General Assembly is empowered to authorize the State Board to promulgate rules and regulations governing the management of the schools.

Section 135 of Virginia's Constitution requires the application of receipts from certain sources to schools of the primary and grammar grades. These "constitutional funds" are apportioned among the counties and cities according to school population. In addition, the General Assembly is authorized to appropriate other funds for school purposes, and those funds are apportioned as the

General Assembly determines. Section 136 of the Constitution authorizes the counties and towns to levy taxes and appropriate funds for use "in establishing and maintaining such schools as in their judgment, the public welfare may require."

The General Assembly of Virginia has adopted the consistent practice of appropriating funds, other than the "constitutional funds," for distribution to the counties and cities for school purposes. Such appropriations are conditioned upon local appropriations. Thus, before the schools in Prince Edward County were closed, the local school board received its proportion of the constitutional funds, and, in addition, it received whatever funds were appropriated by Prince Edward's Board of Supervisors, plus matching funds from the state which became payable because of the local appropriation. Since the schools were closed, the Prince Edward County School Board received no funds from the state during the school year 1959-1960. It has received its proportionate part of the constitutional funds, but those only, in subsequent years, and these are the funds it has used to keep its physical properties in repair and insured, but they have been insufficient to enable it to do anything else.

This arrangement, the defendants says, is a local option system under which each county is authorized to determine for itself whether or not it will operate any schools and, if so, what schools and what grades. They emphasize the provision of Section 136 of the Constitution which gives the local authorities the right to appropriate funds "in establishing and maintaining such schools as, in their judgment, the public welfare may require," which is limited by a provision that, until primary schools are operating for at least four months per year, schools of higher grades may not be established. This, they say, clearly authorizes and

requires what is done in practice. The local school board, it is said, determines what schools and facilities are required. It budgets the estimated costs of their maintenance and operation, and submits its estimates to the local Board of Supervisors. The Board of Supervisors may not overturn particular determinations of the school board, but it, say the defendants, has an unfettered discretion in levying taxes and appropriating funds. It may appropriate funds equal to the school board's budgetary estimate, but it also may appropriate less or nothing at all. If the Board of Supervisors appropriates nothing for use by the school board, then the matching state funds are unavailable and the schools cannot be operated.

Among Virginia's statutes may be found clear provisions for local option. Under Sections 16.1-201-2 of the Virginia Code, a county may elect to establish juvenile detention facilities. If it does so, the state will contribute funds to meet, in part, the cost of construction and operation. Under Section 32-292, et seq., a county may elect to participate in a program of state-local hospitalization. If a county elects to do so, the state, with certain limitations, will contribute one-half the cost of such hospitalization. The defendants suggest that there is no unconstitutional geographic discrimination in such local option programs, though one or more counties may not elect to participate in them.

Federal analogies readily come to mind. The United States makes available to participating states which enact prescribed legislation, grants for unemployment compensation administration.[23] Under the National Defense Education Act,[24] federal funds are made available to localities conducting in their schools approved programs of science,

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[23] 42 U. S. C. A. § 501, et seq.

[24] 20 U. S. C. A. § 401, et seq.

mathematics and foreign languages. It is suggested that there is no geographic discrimination in the provision for such optional grants, though a state or locality may exercise its option not to participate.

Such local option provisions as those the defendants think analogous are constitutionally unassailable.[25] When a state undertakes to encourage local conduct of educational or social programs by making matching funds available to participating localities, there is no discrimination against nonparticipating localities. Since every locality may participate if it wishes to do so, and the state funds are available to each upon the same conditions, the state is even-handed.

The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as schools are operated in every county. On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.

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[25] Salsburg v. Maryland, 346 U. S. 545; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445; Rippey v. Texas, 193 U. S. 504; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387.

The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here.

In School Board of Carroll County v. Shockley, 160 Va. 405, 168 S. E. 419, the Court held unconstitutional an act of the General Assembly requiring the imposition of local taxes and the use of the proceeds in the construction of a particular school.[26] In Board of Supervisors of Chesterfield County v. School Board of Chesterfield County, 182 Va. 266, 28 S. E. 2d 698, the Court said that the local school board is "to run the schools," and it alone has the power to determine how locally appropriated funds are to be spent. In Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227, the Court held that in levying taxes and appropriating funds for school purposes, the Board of Supervisors exercised a legislative and discretionary function, and that it was not subject to mandamus. In Scott County School Board v. Board of Supervisors, 169 Va. 213, 193 S. E. 52, it had been held that mandamus was not available to a school board to compel the supervisors of its county to appropriate funds sufficient to cover the school board's estimates of the cost of school operation.

In none of those cases, however, has Virginia's Supreme Court of Appeals considered the requirements of Section 129 of the Constitution when schools cease to operate because the local Board of Supervisors levies no taxes and appropriates no funds for the purpose. That Court may conclude that, in light of the closure of the schools in Prince Edward County, Section 129 of the Constitution requires something more of the General Assembly or of the State Board of Education.

That conclusion, however, is not forecast by Harrison v. Day, 200 Va. 439, 106 S. E. 2d 636, in which Virginia's

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[26] See also Almond v. Gilmer, 188 Va. 1, 49 S. E. 2d 431.

Appendix A

Supreme Court of Appeals struck down Virginia's massive resistance laws. Nor is there anything in the Three-Judge Court decision of James v. Almond, E. D. Va., 170 F. Supp. 331, which approaches federal determination of this state question. There, the Governor seized and removed from the school system six of Norfolk's schools subject to desegregation orders. He acted under color of a state statute which required him to do so. In holding the statute unconstitutional the Court did not decide that all schools in Virginia were administered by the state on a state-wide, centralized basis. The seizure was clearly that of the Governor and the discrimination was inherent in the statute whether the schools were otherwise operated upon a local option basis or directly by the state. When the state acts to seize and close every school subject to a desegregation order, its sufferance of continued operation of other schools within its borders is as discriminatory as its direct operation of them.

These controlling questions of state law, uncertain and unsettled as they are, ought to be determined by the Supreme Court of Appeals of Virginia, which alone has the power to give an authoritative interpretation of the relevant sections of Virginia's Constitution and of her statutes. As it was so forcefully said in Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, this Court cannot settle the state questions; it can do no more than predict what Virginia's Supreme Court of Appeals will do when the questions come before it. If we should hazard a forecast and it should be proven wrong, any present judgment based upon it will appear both gratuitously premature and empty when the state questions are authoritatively resolved in the state courts. Particularly is this true when, with so little to guide us, we cannot predict with any semblance of confidence how the several state questions will be ultimately resolved in the state courts. In such

circumstances, abstention until the state questions are determined is the proper course.[27]

Abstention, under the circumstances, is all the more appropriate because the case of County School Board of Prince Edward County, Virginia, et al. v. Griffin, et al., is already pending on the docket of the Supreme Court of Appeals of Virginia and will be heard by that Court in October. From a reading of the opinion of the Circuit Court of the City of Richmond in that case, it appears that the essential questions of state law upon which decision here turns are presented in that case and will be determined by that Court as it considers and adjudicates the same primary question tendered in this case, the existence of judicially enforceable rights in the plaintiffs to have the schools reopened. That state court proceeding had not been commenced when the District Judge acted on the primary question in this case. In abandoning his earlier decision to abstain, he referred to the fact that no such proceeding was pending or then contemplated. Had it been then pending, he probably would have awaited its outcome. The fact that a case, apparently ripe for decision, is now pending on the docket of Virginia's Supreme Court of Appeals, makes easier our conclusion that the controlling questions of state law, which govern the application of unquestioned constitutional principle, ought to be determined by the state courts, and that, when they may be so determined, the federal courts ought to abstain from constitutional adjudication premised upon their notions of state law which may or may not turn out to be accurate forecasts.

Accordingly, the judgments below will be vacated and the case remanded to the District Court, with instructions

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[27] Railroad Commission of Texas v. Pullman Company, 312 U. S. 496; Harrison v. N.A.A.C.P., 360 U. S. 167; Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101.

to abstain from conducting further proceedings until the Supreme Court of Appeals of Virginia shall have decided the case now pending on its docket entitled County School Board of Prince Edward County, Virginia, et al., v. Leslie Francis Griffin, Sr., et al., and that decision has become final, with leave to the District Court thereafter to entertain such further proceedings and to enter such orders as may then appear appropriate in light of the determinations of state law by the Supreme Court of Appeals of Virginia.

Vacated and remanded.

J. Spencer Bell, Circuit Judge, dissenting:

Because of the inordinate delays which have already occurred in this protracted litigation, I hasten, without exhausting the subject, to indicate the reasons for this dissent.

I think the order of the District Court should be implemented at once for either of two reasons, each of which is amply supported by the findings of fact and the conclusions of law set forth in the District Court's opinion. First, because the public school system of Virginia is maintained, supported and administered on a statewide basis by the Commonwealth of Virginia; therefore, the closure of the schools of this one county constitutes discrimination. Second, the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated.

The plaintiffs assert a federal right guaranteed by the Constitution; the jurisdiction to determine this right is vested in the federal courts. A refusal to adjudicate this right would be violation of the courts' duty. *Monroe* v. *Pate*, 365 U. S. 167 (1961). The plaintiffs must not be re-

quired to exhaust their remedies in the state's courts before having their federal rights determined in the federal courts. *McNeese* v. *Board of Education*, 31 U. S. L. W. 4567 (decided June 3, 1963). The defendants have been given ample opportunity heretofore to have the state courts speak. In its opinion of July 25, 1962, the district court said:

> "... upon the further assurance of counsel for the Board of Supervisors of Prince Edward County (which assurance was given after conferring with the Attorney General of Virginia and counsel for the School Board of Prince Edward County) that he would file such a suit if the petitioners failed to do so, this court abstained from determining the issue, pending a final ruling by the Supreme Court of Appeals of Virginia."

In spite of this assurance the defendants not only failed to bring a suit for this purpose, but they deliberately failed to raise the issue in a suit brought by the plaintiffs to assert their rights under the Virginia Constitution. Finally, at long last, when the district court proceeded to declare the plaintiffs' rights under federal law, the defendants commenced the suit to raise the issue in the state courts, demanding that the federal courts further abstain. This is not abstention—this would be a humble acquiescence in outrageously dilatory tactics, and the district court was right to reject it. We have neither the duty nor the right to pressure the state courts to declare federal rights, and they are not bound by conscience or law to engage in a race with the federal courts to declare federal rights [1]. Courts are not self-activating, if the defendants here chose to refrain from seeking a state court determination until the

[1] The Supreme Court of Appeals of Virginia refused last June to put the case ahead on its calendar.

district court was finally forced to act, they should not now be heard to call for further abstention—when as the district court said on October 10, 1962: "Abstention would create an irreparable loss in the formal education of the children of Prince Edward County". Abstention is not sanctioned by any law—it is a court evolved doctrine of courtesy—it must not be used to frustrate the plain rights of litigants. To do so now under the present posture of this case is not abstention, it is abnegation of our plain duty.

A brief review of the record leaves no doubt whatsoever that the public schools of Virginia were established and are being maintained, supported and administered in accordance with state law, primarily on a statewide basis. I see no need to review in detail the evidence supporting that conclusion. The Constitution of the state compels the Legislature to appropriate funds for this purpose—funds derived from the taxation of Negroes as well as whites in Prince Edward and other counties. The Virginia Code provides that the public free school system shall be administered by a State Board of Education which is responsible for dividing the state into appropriate school divisions. The State Board prescribes the rules and regulations for conducting the high schools as well as the requirements for admission. A Superintendent of Public Instruction is appointed by the Governor. Local school boards are regulated to a great extent by state law. All power of enrollment or placement of pupils in the public schools is vested in a State Pupil Placement Board, whose members likewise are appointed by the Governor. I do not believe that it can be seriously argued that public education is not a state function in Virginia. This being true, since the state maintains and operates schools elsewhere in the state, its failure to do so in Prince Edward County, by permitting the County Board of Supervisors to close the schools for a discriminatory reason, violates the Fourteenth Amendment.

Appendix A

The district court's finding that Virginia is operating and maintaining a statewide system of schools not being clearly erroneous is binding on us. Indeed it is a fact so firmly established that we would be required to take judicial notice of it. That decision is buttressed by the decision of the three judge district court in *James* v. *Almond*, 170 F. Supp. 321, 337 (E. D. Va. 1959), wherein the court said:

> "Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools . . . [cannot close one or more because of segregation] . . . While the State of Virginia directly or *indirectly* maintains and operates a school system with the use of public funds, *or participates by arrangement or otherwise* in the management of such a school system [it may not close schools to avoid segregation]." (Emphasis added)

It is worthy of note that the Supreme Court of Appeals of Virginia points to the mandatory provisions of Section 129 of that state's Constitution, which provides: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State". *Griffin* v. *Board of Supervisors of Prince Edward Co.*, 203 Va. 321, 124 S. E. 2d 227.

Faced with the inescapable fact that the State of Virginia is maintaining and operating a statewide system of schools, the deeply abstruse and highly technical arguments about whether Virginia's laws permit a local unit to close its schools are academic under the Fourteenth Amendment. For this purpose the county is acting as an agency of the state, and the state may not directly or indirectly evade the

command of the Amendment. What the state could not do directly in *James* v. *Almond* it may not do indirectly in this case. In *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, aff'd 365 U. S. 569 (three judge court), the State of Louisiana attempted to set up a local option system to avoid a court order to desegregate. The court struck down the law and forbade the practice. In doing so it said:

> "The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility by carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless."

And this court in an opinion concurred in as to this point by every member of the court, including the members of the present panel, in the case of *Bell* v. *School Board of Powhatan Co.* (No. 8944, decided June 29, 1963), — F. 2d —, said of the School Board of that Virginia County:

> "They are not told to exercise powers they do not have; they are merely forbidden to take any steps themselves toward the closing of the schools, and *this injunction is necessary to prevent a violation of the equal protection of the Fourteenth Amendment.*" (Emphasis added)

Whether the local unit is ordered to close its schools or permitted to do so under state law is immaterial, so long

as the state directly or indirectly participates in the operation of a statewide system of schools.

Nor do I think this suit is barred by the Eleventh Amendment to the Constitution of the United States. It is well settled that a suit against a political subdivision of a state, such as a county, is not barred by the Eleventh Amendment. The leading decision in *Lincoln County* v. *Luning*, 133 U. S. 529 (1890), where the point was urged that the county is an integral part of the state and could not, therefore, be sued under the Eleventh Amendment. The Supreme Court said:

> "... It may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established."

In *Kennecott Copper Corporation* v. *State Tax Comm.*, 327 U. S. 573 (1946), the Supreme Court again held that consent was not necessary for suits against counties and municipalities. In short, insofar as the Eleventh Amendment is concerned a suit in equity to compel affirmative action by a county through its Board of Supervisors is maintainable for the simple reason that a county as such is not a "state" within the meaning of the constitutional prohibition. I am aware of those cases cited which invoke the constitutional bar if the subsidiary political unit bears such a relationship to the state in the particular function involved as to constitute it in agent of the state with respect to that function. They do not apply in this case. This Court has recently discussed this distinction in *Duckworth* v. *James*, 267 F. 2d 224 (4 Cir. 1959), *cert. denied* 361 U. S. 835. There it was held that an injunction would lie to restrain the City of Norfolk from withholding funds from the

Norfolk School Board. It is the state scheme itself which provides that part of the essential operating revenue must come from the taxes levied by local boards. The words of this Court in *Duckworth* v. *James, supra,* are pertinent:

> "The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or *seeks to carry out a valid statute in an unconstitutional manner.* (Emphasis added.) In such cases it is held that his action is not the act of the state but the act of an individual which may be restrained by the injunctive power of the federal court."

Neither am I impressed with the argument that the district court has no power to compel a levy of taxes for a monetary appropriation by the defendant Board of Supervisors should it fail to obey the mandate of the district court. It should be enough to cite *Virginia* v. *West Virginia,* 246 U. S. 565 (1918). There the defense was advanced by West Virginia that the judicial power of the United States did not extend to the coercing of a judgment by a decree requiring a tax to be levied. The opinion of the court is plain in its implication that West Virginia could be compelled to pay if compulsion were the only way to accomplish the result. But it is necessary here only to decide whether the subdivision of the state (Prince Edward County) may be required to provide the funds necessary to comply with the judgment. There can be no doubt that the judicial power may enforce the levy of a tax to meet a judgment rendered. *Labette County Commissioners* v. *Moulton,* 112 U.S. 217 (1884). See also *Graham* v. *Folsom,* 200 U.S. 248 (1906). It is to be noted that the

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Supreme Court of Appeals of Virginia in *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962), did not consider whether under federal law the County Board could be compelled to levy taxes and appropriate funds for the operation of the county public school system. The Virginia law does not prohibit the Supervisors from levying the taxes and appropriating the revenue, it merely vests in them the power to decide whether this shall be done. In *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866), a suit was brought in a federal court to recover interest on bonds. The Supreme Court required that discretionary taxing power be exercised in a particular manner. I think that under federal constitutional law an affirmative order is appropriate here notwithstanding the unavailability of mandamus under Virginia law. The County Board has the unquestionable power to levy the taxes; the schools of this County may not remain closed while the state maintains a school system elsewhere.

Finally, the Board of Supervisors of Prince Edward County closed the public schools for the sole purpose of avoiding compliance with the decree of this court. The district court so found. The Board publicly proclaimed its intention and purpose by its resolution dated May 3, 1956:

> "Be It Resolved, That the Board of Supervisors of Prince Edward County . . . do hereby declare it to be the policy and intention of the said Board . . . that no tax levy shall be made . . . nor public revenue derived from local taxes . . . be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any arrangement or plan whatsoever."

This was the defiant response to the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483

(1954), applying expressly to the schools of Prince Edward County. The district court found that it was passed in anticipation of our decision in 1959 that desegregation in compliance with *Brown* should commence in the fall of 1959. In the factual context of this case I cannot agree with the majority that this was a permissible compliance with the Supreme Court's order. The law has long been settled that such conduct violates the Fourteenth Amendment and may be enjoined. *Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Aaron* v. *Cooper*, 261 F. 2d 97 (8 Cir. 1958); *James* v. *Duckworth*, 170 F. Supp. 342 (E. D. Va. 1959); *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959); *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), *Aff'd sub nom Faubus* v. *Aaron*, 361 U.S. 197; *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E. D. La. 1960). Equal educational opportunity through access to nonsegregated public schools is secured by the Constitution. The state has an affirmative duty to accord to all persons within its jurisdiction the benefits of that constitutional guarantee. *Taylor* v. *Board of Education*, 294 F. 2d 36 36 (2 Cir. 1961). Indeed Congress regarded so highly the duty of maintaining public schools that when it readmitted at least three Confederate states, Virginia, Mississippi and Texas, it specifically required that their constitutions:

> "... shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of school rights and privileges secured by the constitution of said State." 16 Stat. 62, 67 and 80 (1870).

It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

APPENDIX B

May 3, 1956 Resolution of Board of Supervisors of Prince Edward County.

At a regular meeting of the Board of Supervisors of Prince Edward County held at the courthouse thereof on the 3rd day of May 1956, at which meeting all members of the board were present, the following resolutions were adopted unanimously:

I

BE IT RESOLVED BY THE BOARD OF SUPERVISORS, That we do hereby express to the people of Prince Edward County our gratitude that they have made known to this board so clearly their views upon the grave problems with which we are confronted with respect to our schools. The support of our people makes the burden of our responsibilities lighter and the course of our future action clearer. We trust the people of the county will continue to make known to us their views as we go forward to meet our problems together.

II

BE IT RESOLVED, That the Board of Supervisors of Prince Edward County as the elected representatives of the people of Prince Edward County, do hereby declare it to be the policy and intention of said board in accordance with the will of the people of said county that no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

III

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor of Virginia, the superintendent of public instruction, and the State Board of

Education are hereby requested to pay any State revenue to the School Board of Prince Edward County in support of public schools in accordance with the policy adopted by the board of supervisors of said county for the payment of local revenues to said school board.

IV

BE IT FURTHER RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the "Affirmation" signed by citizens and school patrons of the county is hereby received and directed to be filed with records of the board and it is further resolved that the "Statement of Convictions and Purposes" adopted by the citizens of this county present at this meeting (being approximately 250 in number) be received by the board and it is directed that the same be filed with the records of the board.

And the clerk of this board is directed to prepare copies of the affirmation with a statement attached thereto showing the number of the citizens whose names are signed thereto together with copies of the "Statement of Convictions and Purposes" and that one copy of each be transmitted to the School Board of Prince Edward County, the Governor of Virginia, the superintendent of public instruction, the attorney general of Virginia, the State Board of Education, Representative J. H. Daniel and Senator J. D. Hagood, together with a copy of this resolution, and of the resolution this day adopted stating the policy and intention of this board with respect to the levy of taxes and appropriation of local revenue for school purposes.

V

BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF PRINCE EDWARD COUNTY, That the Governor be and he is hereby respectfully requested not to call a special session of the

Appendix B

Legislature of Virginia for the purpose of presenting any legislative plan which would require, permit, or authorize under the laws of Virginia the teaching of white and Negro children together in the public schools of Prince Edward County.

APPENDIX C

Explanation of the June 3, 1959 action of The Board of Supervisors in refusing to appropriate money or levy taxes for the operation of a public school system in Prince Edward County for the 1959-60 school term.

The action taken today by the Board of Supervisors of Prince Edward County has been determined upon only after the most careful and deliberate study over the long period of years since the schools of this county were first brought under the force of Federal Court decree. It is with the most profound regret that we have been compelled to take this action. We do not act in defiance of any law or of any court. Above all we do not act with hostility toward the negro people of Prince Edward County.

On the contrary, it is the fervent hope of this Board that the friendly and peaceful relations between the white and negro people of the county will not be further impaired and that we may in due time be able to resume the operation of public schools in this county upon a basis acceptable to all the people of the county.

The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time maintain an atmosphere conducive to the educational benefit of our people.

We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.

Our action is in accord with the will of the people of the county repeatedly expressed during the past five years and